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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 249

CLEMON BARLOW, *et al.*,

Petitioners,

vs.

B. L. COLLINS, as State Executive Director of the Alabama Agricultural Stabilization and Conservation Services; HORACE GODFREY, as Administrator of the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture; and ORVILLE L. FREEMAN, as Secretary of the United States Department of Agriculture,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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I.

Petitioners Have Standing to Bring This Action.

Respondent denies that standing exists; but does so on the basis of a test that renders the issue of standing virtually indistinguishable from the issue on the merits. Thus, Respondent concedes standing if, and only if, "the Secretary's regulation exposes [Petitioners] to economic coercion by their landlords so to assign which it was a major purpose of Section 8(g) and 7 U.S.C. § 1444(d)(13) to avoid." Resp. Br., p. 17. Yet if the standing test is cast

with such specificity and met, the merits are won, for the Secretary has then defined the term "making a crop" in a manner which defeats not merely congressional intent, but a "major purpose" of the Act as well. Plainly it is not the law that petitioners with standing always win their lawsuits, e.g. *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1. However, that is the consequence of the test Respondent now proposes.

The standard the Government advanced in Opposition to Certiorari, pp. 10-11[1] is substantially different. There Respondent "agree[d] with petitioners" that the controlling principles were to be found in both *Hardin* v. *Kentucky Utilities Co., supra,* and *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F.2d 920 (2d Cir. 1968). Indeed, Respondent phrased the standing issue by interpolating the facts of this case into the Second Circuit's language in *Norwalk CORE*:

> "'The cases make it clear that the answer [to the question whether petitioners have standing to challenge the Secretary's interpretation of Section 8(g)] turns on whether Congress' purpose in enacting [the "making a crop" language] was to protect their interests.'" Brief in Opposition at 11. See *Norwalk CORE* v. *Norwalk Redevelopment Agency, supra,* 395 F.2d 920.

There was no need to demonstrate for standing purposes that Congress' major purpose was to protect the Petitioners against the exact regulatory change complained of. Respondent now apparently disavows the *Norwalk CORE* decision, as it is neither relied upon nor distinguished.

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[1] Indeed, the present effort is the third test proposed by the Government. In the Courts below, Respondent urged a test precluding protection against economic pressures generally.

Petitioners believe that *Norwalk CORE* properly applies this Court's statement in *Hardin,* 390 U.S. at 7, that "since respondent is thus in the class which § 15d is designed to protect, it has standing under familiar judicial principles to bring this suit, see *Stark* v. *Wickard,* 321 U.S. 288, 309 (1944); cf. *United States* v. *ICC,* 377 U.S. 426, 433-34 (1949)." Nor is this any different than the "intended beneficiary" test Petitioners propose at Brief 17-18.[2]

The standing doctrine has, we believe, only two components in a case, as here, where a private litigant "asserts a distinctive or discriminatory impact which specially entitles him to challenge an allegedly illegal administrative action."[3] The basic requirement, "the gist of the question of standing," *Baker* v. *Carr,* 369 U.S. 186, 204 (1962), is that the litigant be "adversely affected in fact" by the administrative action he challenges. *The Chicago Junction Case,* 264 U.S. 258 (1924); *CBS* v. *United States,* 316 U.S. 407 (1942). Actual harm from administrative action not only satisfies the constitutional requisite of a "case or controversy," *Flast* v. *Cohen,* 392 U.S. 83, 99 (1968), but, contrary to the Government's intimations,

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[2] Two questions must be distinguished. One is how it is to be determined that particular statutory language is intended to "protect" or "confer a benefit upon" a would-be litigant where the legislative history of that language is uninformative. We submit that where an entire statutory section is obviously so designed, the purpose that permeates the whole should be held applicable to the part, unless the particular language itself clearly indicates a different purpose. The second question is what does the statute protect against? If the private "interest" allegedly infringed is stated most narrowly, this question is nothing but the question on the merits phrased in a different way.

[3] L. Jaffe, Judicial Control of Administrative Action, 501 (1965). Cases where relief is sought against public officials on the basis of rights as citizen or taxpayer, cf. *Baker* v. *Carr,* 369 U.S. 186, *Flast* v. *Cohen,* 392 U.S. 83, raise additional issues.

comprises the "personal stake in the outcome of the controversy so as to assure concrete adverseness which sharpens presentation of the issues." *Flast* v. *Cohen, supra,* at 99. Genuine and substantial aggrievement also goes far to establish the appropriateness of judicial review. "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140 (1967). "[O]ne who is in fact hurt by illegal action should have a remedy." K. Davis, Administrative Law Treatise, § 22.02. See also L. Jaffe, Judicial Control of Administrative Action, 336 (1965). Petitioners are plainly adversely affected in fact by the regulation allowing their landlords unrestricted access to the credit generated by the federal benefits of tenant farmers. Indeed they are the only persons whose interests are directly impaired by the challenged administrative action. Compare *Associated Industries* v. *Ickes,* 134 F.2d 694, 704 (2d Cir. 1943), certiorari vacated as moot, 320 U.S. 707.

Blending with the constitutional minimum is a judicially imposed rule of restraint requiring that the general interest a litigant asserts be one to which Congress has granted some recognition in the statutory program on which reliance is placed.[4] See *FCC* v. *Sanders Brothers Radio Station,* 309 U.S. 470 (1940); cf. *Flast* v. *Cohen, supra.* This latter requirement is imposed for reasons purely pragmatic. Where the statutory scheme evinces no concern with a particular class of litigants or type of harm,

[4] In Professor Jaffe's words, *op. cit. supra* at 508: "Where the legislature has recognized a certain 'interest' as one which must be heeded, it is such a 'legally protected interest' as warrants standing to complain of its disregard."

the assumption is that Congress intended no remedy, and that the Courts have more pressing business than to assure proper execution of the law at the behest of interlopers. Hence there must be a "logical nexus between the status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen, supra* at 102. For example, a landowner, though harmed in fact by the prior inability of his tenants to assign for rent, would have no standing to challenge the former regulation; nor would a former supplier of seed to tenants have standing to challenge the present regulation.

But under the *Hardin* and *Norwalk CORE* tests, Petitioners have standing to challenge the present resolution. The legislative history of Section 8(g) of the Soil Conservation and Domestic Allotment Act, 16 U.S.C. § 590h(g) makes clear that the protections which delimit the right to assign were (a) necessary for passage of the bill and (b) imposed to protect tenant and sharecropping farmers from losing their federal benefits by assigning them improvidently, either because of their own bad judgment or because of the pressures to which they were frequently subjected.[5] Thus Congress created a form of spendthrift trust for their benefit. Nor was the conferral of such special protections an unusual event. A network of federal statutory provisions, including provisions in the Upland Cotton Program, seek to ensure that federal agricultural subsidies actually benefit all farmers, non-landowners as well as landowners. Pet. Br. pp. 19-21. The benefits of the former group were not to be siphoned away by speculators, landowners or others.

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[5] Respondent's suggestion, Br. p. 25, that the making a crop limitation was designed to "advance *government* interests by assuring that the federal funds would aid the faltering farm economy," ignores that a major purpose of the federal program, then and now, is to stop people from making too many crops.

Respondent argues that whatever the history of Section 8(g) may be, the legislative history of 7 U.S.C. § 1444(d)(13) bespeaks no similar concerns for small tenant farmers. However, this approach distorts the process of statutory construction. The very fact that Congress chooses to act by incorporating old legislation, with all its protective features, rather than by drafting anew, reflects a belief that the purposes of the old law remain viable. And that Congress still had the plight of tenant farmers very much in mind in enacting the Upland Cotton Program is apparent from 7 U.S.C. § 1444(d)(10) as well as the several protective features of 8(g). It is Section 8(g) which is the source of law herein. The enactment of 7 U.S.C. § 1444(d)(13) cannot be held to have modified its meaning.[6]

II.

Petitioners Are Entitled to Relief on the Merits.

1. The merits are properly before this Court on its unlimited grant of certiorari. If standing is upheld, a remand for determination of the merits would be inappropriate

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[6] Ignoring these considerations, Respondent asserts that the legislative history of 7 U.S.C. § 1444(d)(13) affirmatively reveals a purpose of "expanding" assignments which is relevant to the issue of standing. The argument falls with its premise. How the language in the Conference Report, H.R. Rep. No. 1123, 89th Cong., 1st Sess. p. 33, that "production loans" could be obtained under the new bill reveals an expansive purpose is not apparent. We have detailed in our Brief at 33-37 the legislative history of the 1966 amendment to Section 8(g), 80 Stat. 1167 as amended § 590h(g) which reveals that Congress was there concerned with facilitating the mechanics of assignments and broadened little if at all the right to assign. Furthermore, when Congress wished to draft a broad assignment provision in the Upland Cotton Program, it knew how to do it. 7 U.S.C. § 1305. Congress did desire to make it more convenient to actually make an assignment, but that Congress would desire to make it less time consuming for tenant farmers to effectuate their assignments is in no way inconsistent with Petitioners' position.

because both issues require consideration of the same basic legislative materials. Furthermore, although the Court of Appeals below did not rule on the merits, its position was clearly indicated, as Respondent has recognized. Resp. Brief in Opposition p. 10n.

2. Payment of cash rental for land cannot, Petitioners submit, be deemed part of "making a crop." The agricultural meaning of the phrase, a meaning which is confirmed rather than depreciated by Respondent's search in the dictionaries (Resp. Br. at 25 n. 15), does not include such payments. Undoubtedly, this meaning was familiar to the Senate and House Agricultural Committees. It was also clearly understood by the then Secretary of Agriculture who immediately and specifically barred rent payments—cash or commodity. (See ACP-69, Pet. Br. p. 43.) Cf. *Norwegian Nitrogen Prods. Co.* v. *United States,* 288 U.S. 294 (1933); *Udall* v. *Tallman,* 380 U.S. 1 (1965). It was so understood by successive Secretaries of Agriculture who maintained that limitation. Yet Respondent insists that Congress in saying "to finance making a crop" really meant to say "to finance all current farming costs."[7]

It is alleged in support of this view that the legislative history of Section 8(g) reveals no intent to bar payments of cash rent to landowners, particularly insofar as Congress acquiesced in assignments to landowners to finance other farm purchases. Resp. Br. p. 30. Secondly, it is urged that any congressional purpose to secure the independence of tenant farmers would strikingly appear in the

[7] It is doubtful that the Secretary understands the expenses of "making a crop" to be the equivalent of "current farming costs." Thus, the regulations, 7 C.F.R. § 709.3, apparently do not include securing funds for payment of current wages, an obvious current farming cost, as a permissible assignment purpose.

legislative history of § 8(g) and 7 U.S.C. § 1444(d)(13) insofar as federal farm programs are not designed to alter the structure of landowner-tenant relationships. Resp. Br. pp. 30-31. Finally, it is claimed that the assignment provisions of 7 U.S.C. § 1444(d)(13) are intended for and used by all farmers, and are not intended principally for tenants' benefit. Resp. Br. pp. 31-32. All three contentions are, we believe, erroneous.

Any argument that Congress, in enacting Section 8(g) did not intend to narrow the farming costs for which assignments might be made blinks the fact that the Secretary of Agriculture immediately so understood the statute. Cf. *Udall* v. *Tallman, supra.* Nor was Congress inconsistent in permitting tenants to assign to landowners to secure some purchases while prohibiting assignments to pay rent. Seeds, tools, food, clothing and the like can be bought from numerous sellers; and if the landowner's prices are too high, the tenant can deal elsewhere. The terms of land rental, however, are in the exclusive control of the landowner. As federal law has continually sought to protect the tenant against loss of benefits as a result of manipulation of the terms of land rental, see Pet. Br. pp. 19-21, it was obvious for Congress to bar loss of another type of benefit, credit, as a result of a different form of manipulation. This was done by barring assignments for rent.

Nor does such a congressional intention indicate any desire to change the pattern of economic relationships in the South, a purpose which federal agricultural programs have generally eschewed. Respondent entirely misconceives our argument in thinking we claim that the assignment provisions are intended as a Magna Carta for poor farmers, or that "Section 8(g) was meant radically to revise tenant-

landlord relationships through federal purchase of the tenant's economic independence." Congress' purpose was not to change those relationships, but was to prevent their alteration in response to the availability of federal benefits. This protection does not grant tenant farmers independence in any grandiose sense, but simply assures that the credit resource afforded by assignment of one's own federal benefits in fact goes to the tenant farmer. Tenant farmers are more "independent" as a result of Congress' action only because it is a fact of life that people who have money have options available to them that the utterly destitute do not have.

The absence of legislative declamations of a purpose to effect major social reforms by the assignment provisions is thus entirely understandable. For example, price support payments are one type of federal benefit: Congress has clearly sought to ensure that these funds accrue to the benefit of poor tenant farmers. 16 U.S.C. §§ 590h(e)(f), 7 U.S.C. § 1444(d)(10). Yet in so doing, Congress did not intend "to revise radically" patterns of economic relationships. The same is true when Congress made sure that credit resources, another form of the federal price support payment, would also flow to poor farmers by limiting assignments to those for the purpose of "making a crop."

Respondent's final contention is that the purpose of Section 8(g) and 7 U.S.C. § 1444(d)(13) is to benefit all farmers, not merely tenant farmers, and that the Secretary must have considerable leeway in implementing its terms. First, despite the generality of the statutory language, the purpose of Section 8(g) was clearly to aid tenant and sharecropping farmers; Section 8(g) was part of § 103 of the Agricultural Adjustment Act of 1938, 52 Stat. 35, which

was entitled "Tenant Provisions." Indeed the no discount restriction but affirms this purpose. Further, that Section 8(g) was used primarily by tenant farmers was also known to Congress. Letter of Secretary of Agriculture Charles Brannan to the President of the Senate, January 21, 1952, S.Rep. No. 1305 (1952). While it is true that the legislative history of 7 U.S.C. § 1444(d)(13) does not state expressly that Congress was there motivated by concern for small farmers who rent land (but *cf.* 7 U.S.C. § 1444(d)(10)), Respondent is wrong, for the reasons we have set forth above in the standing context in urging that the contrary is to be assumed.

That some well-off farmers may utilize no-discount assignments is no basis for altering the limitations Congress imposed on assignment rights for the protection of tenant farmers. However, it must be added that Respondent's demonstration utterly fails to convince that the major users of assignments are in fact not poor farmers, potentially subject to exploitation by the persons from whom they rent land. Although the figures are not broken down by Respondent, the vast majority of assignments appears to be for slightly more than $1,000, perhaps $1,300. Respondent's figures, Resp. Br. pp. 10, 31 n. 19, as to "average" assignments on a national basis are distorted by the impact of nearly forty million dollars (out of a national total of only one hundred forty-nine million dollars) being paid to a mere two thousand seven hundred assignors in two states removed from the traditional Southern cottonbelt, Arizona and California, where the patterns of cotton farming are dramatically different.[8]

[8] In Arizona and California, cotton is grown on a very few large and highly mechanized farms. While the yields rate per acre these

Until the Secretary's recent *volte face,* the exact issue herein—the assignability of federal cotton payments to pay cash rent—had been crystal clear. It was clear because of the language Congress employed to limit the right to assign, and clear because of an explicit administrative regulation covering the point. When Congress enacted 7 U.S.C. § 1444(d)(13), incorporating Section 8(g) by reference, it gave no indication that it contemplated or authorized a compromise on the point, a compromise that would severely undercut the ability of tenant farmers to utilize effectively the credit Congress created for them. Rather, the basic premise when Congress acts by incorporating other laws is that their meaning is relatively fixed, not fluid. That premise is entitled to special weight where the language used to incorporate itself implies recognition that the meaning of the statutory language has been spelled out by past administrative construction. Thus striking down the Secretary's newly issued and unauthorized regulation is not a wooden or unique application of the doctrine of congressional ratification of well-settled administrative interpretation.[9] Where the evidence indicates rather clearly that Congress intended a particular

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farmers attain is several times higher than that of traditional cotton producers, see 7 C.F.R. § 722.466, the contribution to the total national crop is small.

[9] However, Respondent's effort, Br. p. 34n., to limit narrowly the doctrine of congressional ratification by re-enactment of a statute with long-standing administrative interpretations to cases where the principle is used as a validating device cannot survive a reading of the cases Respondent cites. Thus, in *Fribourg Navigation Co.* v. *Commissioner,* 383 U.S. 272, this Court plainly held the change in administrative interpretation invalid prospectively as well as retrospectively. Nor were "apparent equities for permitting taxpayer the benefit of prior law" mentioned, save by the dissenters, who pointed out that there had been no reliance on past law. Moreover, Respondent's assertion that the re-enactment doctrine is particu-

construction of the statute for a particular reason, and where that construction was given effect immediately, there is no basis for a change which removes the protection.

Respectfully submitted,

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larly appropriate for taxation cases is manifestly unsound. The nub of the "regulations problem" is that Congress does frequently reenact tax laws and it cannot possibly peruse carefully each and every regulation under the Internal Revenue Code.